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December 9, 1988

JAN 10 1989

Mr. Steve Taylor, Commissioner
Department of Agriculture
The Concord Center
10 Ferry Street, 4th Floor
Concord, New Hampshire 03301

Re: Enforcement of RSA 438:40 and 438:15

Dear Mr. Taylor:

This is to reply to Mr. Richard Cote's and Mr. Kevin Young's memorandum dated November 10, 1988. That memorandum raises two questions: (1) does the Bureau of Weights and Measures of the Department of Agriculture need to prove that a person acted with a culpable mental state when it prosecutes that person under RSA 438:40 (Supp. 1988) and (2) may the Bureau continue to rely on RSA 438:15, which allows it to conduct inspections and make seizures without a formal warrant?

1. Required Mental State

RSA 438:40 does not expressly require the Bureau to prove that a person purposefully or knowingly engaged in conduct with respect to each element of the offenses established in that section. The issue to be addressed is thus whether such a requirement should be implied by law in prosecutions begun by the Bureau of Weights and Measures under that statute. Although it is a close question, the better view in our opinion is that the Bureau is not now required to allege and prove that a defendant has knowingly acted with respect to each element of the charged offense.



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"Public tort" type criminal offenses often are established by statutes that provide no express mental state that is necessary for the offense to be committed. See generally, W. LaFave & A. Scott, Substantive Criminal Law, §3.8 (1986). The statutes establishing such offenses have generally withstood scrutiny. Id.; see also Goodrow v. Perrin, 119 N.H. 483 (1979) (upholding New Hampshire statutory rape law and holding that defendant need not knowingly engage in sexual intercourse with under age female).

It must be noted, however, that a court could construe RSA 626:2 I (1986) to require the Bureau to prove that a person charged with a violation of RSA 438: 40 acted knowingly with respect to each element of the offense. RSA 626:2 provides:

A person is guilty of murder, a felony, or a misdemeanor only if he acts purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense. He may be guilty of a violation without regard to such culpability.

RSA 626:2 I. It is not clear, however, what meaning a court would give to the words "as the law may require." Furthermore that same statute states that it is not necessary for a person to have knowledge as to whether conduct constitutes an offense or as to the existence or meaning of the statute defining the offense in order for the person to be guilty of the offense. RSA 626:2 V. Furthermore, the application of RSA 626:2 to strict liability offenses was implicitly rejected in Goodrow, 119 N.H. at 490 (RSA 626:2 cited and quoted by dissenting judge, no similar discussion in majority opinion). Strict liability type weights and measures laws have been upheld in other jurisdictions. See, e.g., People v. Jaboro, 76 Mich. App. 8, 255 N.W. 2d 355 (1977); State v. Brillo Mfg. Co., 63 N.J. Super, 287, 164 A2d 627 (1960); see also People v. Jackson, 98 Ill. App. 3d 418, 53 Ill. Dec. 943, 424 N.E. 2d 734 (Ill. App. Ct. 4th Dis. 1981).

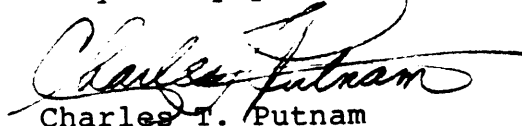
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2. Administrative Inspection Warrants

RSA 438:15 authorizes the Bureau to enter premises, arrest persons and seize evidence without a formal warrant. Although the statute does not require the Bureau to obtain warrants, see RSA 438:15, RSA 595-B:7, the wiser practice, in our view, is to comply with the administrative inspection warrants act, RSA 595-B, and obtain administrative inspection warrants before conducting major enforcement operations.

Thank you for your inquiry. Please contact me if you have further questions, or if I have overlooked any relevant facts.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Charles T. Putnam", written over a horizontal line.

Charles T. Putnam
Assistant Attorney General

CTP/kab
0-88-062